

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the matter of)	
)	
Amendment of Section 73.202(b),)	
Table of Allotments,)	MM Docket No. 90-66
FM Broadcast Stations.)	RM-7139
(Lincoln, Osage Beach,)	RM-7368
Steelville, and Warsaw,)	RM-7369
Missouri).)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: February 28, 2002

Released: March 25, 2002

By the Commission:

1. The Commission has before it an Application for Review of a Memorandum Opinion and Order ("MO&O II"), 12 FCC Rcd 4987 (Policy and Rules Div. 1997), in this proceeding, filed by Twenty-One Sound Communications ("Twenty-One Sound"), licensee of Station KNSX (FM), Steelville, Missouri. An opposition was filed by KRMS-KYLC, Inc. ("KYLC"), the licensee at that time of Station KYLC(FM), Osage Beach Missouri; and Twenty-One Sound filed a reply.

BACKGROUND

2. This proceeding began with the filing of a rulemaking petition by KYLC, requesting an upgrade of its Station KYLC (FM), Channel 228A, Osage Beach, Missouri, pursuant to Section 1.420(g)(3) of the Commission's Rules.¹ Specifically, KYLC proposed the substitution of Channel 228C3 for Channel 228A at Osage Beach and the modification of its license for Station KYLC accordingly. To accommodate this upgrade, KYLC also proposed the substitution of Channel 253A for vacant but applied for Channel 229A at Warsaw, Missouri. Thereafter, a Notice of Proposed Rule Making ("NPRM"), 5 FCC Rcd 1119 (Allocations Br. 1990) was released, proposing KYLC's requested channel changes at Osage Beach and Warsaw.

3. In response to the NPRM, two parties, Twenty-One Sound and Dennis J. Klautzer, filed counterproposals. Twenty-One Sound, the permittee of Station KNSX (FM), Channel 227C2, Steelville, Missouri, counterproposed the upgrade of its Station KNSX(FM) by substituting Channel 227C1 for Channel 227C2 at Steelville, Missouri, and modifying its construction permit accordingly. To accommodate its proposed upgrade, Twenty-One Sound also proposed the substitution of Channel 265A for Channel 228A at Osage Beach, the modification of the license of Station KYLC(FM), Osage Beach, to specify operation on Channel 265A, and the substitution of Channel 283A for proposed Channel 264A

¹ Section 1.420(g)(3) of the Rules provides in pertinent part that the license or construction permit for an FM station may be modified to a mutually exclusive, higher class adjacent or co-channel in the same community.

at Doolittle, Missouri, in MM Docket 90-173. Klautzer counterproposed the allotment of Channel 253A to Lincoln, Missouri, as that community's first local service.

4. The Report and Order ("R&O"), 7 FCC Rcd 3015 (Allocations Br. 1992), in this proceeding dismissed the counterproposals filed by Twenty-One Sound and Klautzer for failure to comply with Section 1.52 of the Commission's Rules. This section requires that the original of any document filed with the Commission by a party not represented by counsel be signed and verified by the party and his or her address stated. Since both Twenty-One Sound and Klautzer had failed to include affidavits verifying that the statements contained in their counterproposals were accurate to the best of their knowledge, their counterproposals were dismissed in accord with cited Commission precedent.² In taking this action, the R&O explained that Section 1.402(b) of the Commission's Rules concerning rulemaking proceedings places petitioners on notice that their proposals must conform with the requirements of Section 1.52 regarding subscription and verification and that, in the absence of such verification, petitions may be dismissed. The R&O then granted KYLC's rulemaking petition by upgrading its Station KYLC(FM) on Channel 228C3 at Osage Beach and by substituting Channel 253A for Channel 229A at Warsaw to accommodate the upgrade.

5. Twenty-One Sound filed a petition for reconsideration of the R&O, arguing that, as a Commission permittee, it should not be penalized for lack of verification of its counterproposal as required by Section 1.52 of the Rules. It also contended that the Commission has not consistently applied this rule in past proceedings. The Chief, Policy and Rules Division rejected these arguments in MO&O I, 11 FCC Rcd 6372 (Policy and Rules Div. 1996). The Division Chief found that there are no exceptions in Section 1.52 that exclude Commission permittees or licenses from its requirements. He also pointed out that in allotment proceedings where a petitioner has failed to verify a petition or to rectify the omission of the proper signature in a later petition, the pleading has been dismissed. Finally, MO&O I noted that Twenty-One Sound's counterproposal was also defective for failing to submit pertinent geographical and population data necessary to do a comparison between the mutually exclusive upgrades.³

6. Thereafter, Twenty-One Sound filed a petition for reconsideration of MO&O I, again questioning the dismissal of its counterproposal for lack of verification. Twenty-One Sound reiterated its argument that, as a Commission licensee, it should not be required to verify its counterproposal. In addition, Twenty-One Sound argued that, although its original counterproposal and comments did not contain the requisite geographical and population data, the information was included in its reply comments filed on May 18, 1990. As a result, Twenty-One Sound contended that the Commission had the requisite information in the record to compare the competing upgrade proposals on the merits.

7. In MO&O II, 12 FCC Rcd 4987 (Policy and Rules Div. 1997), the Chief, Policy and Rules Division dismissed as repetitious under Section 1.429(i) of the Commission's Rules Twenty-One Sound's second petition for reconsideration to the extent that it questioned the dismissal of the counterproposal for lack of verification. Since MO&O I affirmed the R&O's dismissal of Twenty-One Sound's counterproposal for lack of verification and did not modify this result in any way, the decision found that further reconsideration on the verification issue was not warranted. Although it acknowledged that after the counterproposal deadline, Twenty-One Sound had submitted geographical

² See 7 FCC Rcd at 3015 n.1., citing South Webster, OH, 4 FCC Rcd 5953 (1989) and Amendment of Sections 1.420 and 73.3584 Concerning Abuses of the Commission's Processes ("Abuse of Process R&O"), 5 FCC Rcd 3910, n.41 (Comm. 1990).

³ KYLC was granted a construction permit for Channel 228C3 at Osage Beach, conditioned on the outcome of this proceeding. Thereafter, it filed an application for a one-step upgrade to Channel 228C2, which was also granted subject to the outcome of this proceeding.

and population data to compare the mutually exclusive upgrade proposals, the decision determined that there was no need to compare the proposals substantively because of the verification defect.

APPLICATION FOR REVIEW

8. The gravamen of Twenty-One Sound's application for review is that the dismissal of its counterproposal for lack of verification is inconsistent with Commission precedent. In support of this position, Twenty-One Sound alleges that the Commission's dismissal policy emanates from its decision in the Abuse of Process R&O, *supra*, where the Commission stated that, in the future, Section 1.52 would be "strictly enforced in allocation proceedings."⁴ While Twenty-One Sound appears to acknowledge that this policy has been consistently applied since October 4, 1990, the effective date of the Abuse of Process R&O, it contends that the Commission has not always imposed the sanction of dismissal against petitions lacking the correct verification filed prior to that effective date. Citing Brooksville and Quitman, MS, 8 FCC Rcd 3537 (Allocations Br. 1993), Twenty-One Sound argues that two initial rulemaking petitions filed prior to October 4, 1990, without verification were accepted and granted.⁵ Since Twenty-One Sound's counterproposal was filed approximately six months prior to the October 4th effective date for strict enforcement, it claims that the Commission should accord similar treatment. Twenty-One Sound further contends that, if reinstated, its counterproposal would better serve the public interest than the Osage Beach upgrade because the Steelville upgrade would serve a greater number of people in its gain area.⁶

RESPONSIVE PLEADINGS

9. In its opposition, KYLC argues that Twenty-One Sound's application for review should be denied because the cases cited by Twenty-One Sound are inapposite and because numerous cases support the staff's decision. While KYLC acknowledges that, in a few cases, the staff considered pleadings or rulemaking proposals that did not initially comply with the verification requirement, KYLC contends that such an approach was taken because of a lack of prejudice to other parties or applicants involved in the allotment proceedings. As an example, KYLC notes that in the Chenango Bridge case, the staff stated that the rules for certification and verification will always be required and only when "... the cure will not prejudice any other party" will it consider comments that did not comply with the rule. Likewise, KYLC contends that in the Brooksville and Quitman, MS case, two petitioners were allowed to cure their failure to verify the initial petitions because "their pleadings resolved conflicting issues" and because both proposals could be granted. Unlike these cases, KYLC claims that the instant proceeding involves mutually exclusive rulemaking proposals and, as a result, considering Twenty-One Sound's counterproposal in spite of its procedural defect would cause prejudice to KYLC's non-defective rulemaking proposal. Finally, KYLC cites numerous cases in which pleadings and counterproposals filed without verification were not accepted.⁷

10. In its reply, Twenty-One Sound disagrees with KYLC's interpretation of the Brooksville and Quitman case. Citing to explicit language in that decision, Twenty-One Sound claims that the stated basis

⁴ 5 FCC Rcd at 3919 n.41.

⁵ Twenty-One Sound also cites Chenango Bridge, NY, 8 FCC Rcd 6621, 6622 n.6 (1993), WTWV, Inc., 33 R.R. 2d 65, 67 n.4 (1975), and United Broadcasting Co., 36 R.R. 2d 1556, 1560 n.1 (Re. Bd. 1976), as cases in which comments, counterproposals, or oppositions were considered despite violations of Section 1.52.

⁶ Twenty-One Sound claims that its proposed upgrade would result in service to an additional 312,246 people while the Osage Beach proposal would serve only 66,289 people.

⁷ See KYLC's opposition at 4 n.2.

for accepting the petitions was that “. . . [the Commission] had placed all parties on notice, via its action in Abuses of Broadcast Licensing and Allotment Processes that the verification requirements of Section 1.52 would be strictly enforced in allotment proceedings, but that since the effective date of Abuses was October 4, 1990, and the petitions had been filed prior to that date, the Commission would accept the petitions.”⁸ Twenty-One Sound further contends that no reference was made in that decision of the need to resolve conflicting issues.

DISCUSSION

11. After a careful review of the record in this proceeding, we believe that Twenty-One Sound’s counterproposal was properly dismissed for failure to verify under Section 1.52 of the Commission’s Rules.⁹ We disagree with Twenty-One Sound’s contention that the staff unfairly applied the rule to its counterproposal but did not do so in other cases where the counterproposals were filed prior to October 4, 1990, the effective date of the Abuse of Process R&O. On the contrary, our review of the cases cited by the parties, as well as other decisions, reveals that in situations where a cure was permitted to a non-verified proposal filed prior to October 4, 1990, the pleading was generally accepted because it would not cause prejudice to other non-defective allotment proposals. For example, in Stuart and Boone, Iowa, 5 FCC Rcd 4538 (Allocations Br. 1990), recon. denied on other grounds, 6 FCC Rcd 6036 (Policy and Rules Div. 1991), the staff permitted an initial rulemaking petitioner to cure its failure to verify and made the allotment “. . . since Channel 300A can be allotted to Stuart without conflicting with any other pending request or allotment. We believe that the failure of petitioner to verify her statements should not result in the severe penalty of depriving Stuart of its first local FM service.”¹⁰ Likewise, in South Webster, OH, 4 FCC Rcd 5593 (Allocations Br. 1989), an allotment was made to South Webster in spite of an objection by another FM station that the rulemaking petition was not properly verified because the allotment could be made without conflicting with the objector’s pending FM application and because it would result in a first local service. Further, in Chenango Bridge, NY, 8 FCC Rcd at 6622 n.6, a subsequent cure to an unverified FM allotment proposal was accepted “. . . because [the] cure will not prejudice any other party.” Thus, language in these three cases explicitly indicates that a lack of prejudice was a key factor in accepting the cure or considering a proposal that was not properly verified.¹¹ Moreover, as a matter of general fairness, absent compelling countervailing considerations, it would not be appropriate to waive established procedural requirements where other parties have fully complied with these requirements and the requested grant of waiver would adversely affect these parties.

⁸ Twenty-One Sound’s Reply at 2, citing Brooksville and Quitman, MS, 8 FCC Rcd at 3537 n.1.

⁹ Although not specifically defined in Section 1.52, “[v]erification is a declaration, made before any officer authorized by law to administer oaths (e.g., a notary public), that the contents of the petition are true.” Harrea Broadcasters, Inc., 52 FCC 2d 998, 1001 (Comm. 1975) (petition to deny license renewal application dismissed in part for failure to verify). This definition of verification was followed for many years. However, the Commission subsequently adopted Section 1.16 that provides that unsworn verifications or declarations (*i.e.*, non-notarized verifications) can be accepted in lieu of sworn affidavits or declarations if they are substantially in the following form: “I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.” In the instant case, the counterproposal did not contain a sworn, notarized verification or an unsworn verification in conformity with Section 1.16.

¹⁰ 5 FCC Rcd at 4537.

¹¹ See e.g., South Webster, 5 FCC Rcd at 5594 n.2 (“Indeed, were we unable to make this allotment without prejudice to WLLT, petitioner’s failure to verify his pleading, or once that omission was pointed out, the failure to remedy the omission, could well result in dismissal of petitioner’s request.”) See also, Arnold and Columbia, CA, 7 FCC Rcd 6302, 6303 (Policy and Rules Div. 1992) (reconsideration petition granted even though not verified under Section 1.52 because acceptance of the pleading will not prejudice any party in the proceeding).

12. In the instant case, our acceptance of Twenty-One Sound's unverified counterproposal would prejudice another party. Specifically, KYLC's rulemaking petition was legally and technically correct when filed. By way of comparison, Twenty-One Sound's counterproposal was signed by one of its principals but did not contain an affidavit by that principal verifying that the statements contained in the proposal were accurate to the best of his knowledge, as required by Section 1.52.¹² It is well established that counterproposals must be legally correct and substantially complete when filed¹³ and that non-verified counterproposals may be dismissed.¹⁴ Since Twenty-One Sound's counterproposal was not properly verified, overlooking this defect would prejudice KYLC, which had filed a proposal that complied with our technical and legal requirements.

13. This failure to verify is also significant for two other reasons. First, as explained in the R&O, Section 1.402(b) places rulemaking petitioners on notice that their proposals must conform to the requirements of Section 1.52. Second, the failure to verify a counterproposal in a FM allotment proceeding could raise abuse of process concerns. As the Commission concluded in its Abuse of Process R&O, "... there is a significant potential for abuse of the allotment process" because parties could file non-*bona fide* expressions of interest for purposes of delay or for the purpose of exacting financial consideration in return for withdrawal. To deter this potential for abuse, the Commission took various measures, including announcing the importance of compliance with the verification requirement. Specifically, the Commission stated that "[t]hese rules [set forth in Section 1.52] aid in ensuring accountability of those filing pleadings with the Commission. Therefore, we believe that these rules should be strictly enforced in allocations proceedings."¹⁵

14. We do recognize, however, that in a few other cases involving FM or television allotment proposals or pleadings filed before October 4, 1990, the Commission has waived the verification rule, accepting the absence or late submission of verification. These cases, however, are distinguishable from the instant case. First, in Canton, Farmington, Elmwood, and Pekin, IL, 3 FCC Rcd 5824 (Policy and Rules Div. 1988), a cure to an unverified counterproposal was accepted since the cured proposal would provide a first local broadcast service to a community. We believe that the Canton case is distinguishable from the instant case because, even though the Commission did not expressly discuss it, there was no actual prejudice caused by acceptance of the subsequent cure to the unverified proposal. Rather, the conflicts to two other proposals were removed due to the availability of an alternate channel and the occurrence of changed circumstances.¹⁶ Further, the Canton case triggers one of the higher FM allotment priorities and thereby provides stronger public interest benefits than the present case.¹⁷ Specifically, the proposal in the Canton case triggered Priority 3, a first local transmission service. By way of contrast, both Twenty-One Sound and KYLC's proposals trigger the catch-all priority of "other public interest matters" (Priority Four) and provide enhanced secondary service.

¹² See R&O, 7 FCC Rcd at 3015 n.2.

¹³ See, e.g., Broken Arrow and Bixby, OK, 3 FCC Rcd 6507, 6511 (Policy and Rules Div. 1988) (supplemental comments not accepted to correct deficiencies in a counterproposal because counterproposals must be technically correct at the time of their filing); Springdale, Arkansas, Carthage, Aurora and Willard, Missouri, 4 FCC Rcd 674 (1989), recon., 5 FCC Rcd 1241 (1990) (counterproposals must be technically correct and substantially complete when filed).

¹⁴ See, e.g., Lake City, SC, 47 FCC 2d 1067, 1069 (Comm. 1974) ("a pleading which is not properly signed and verified in conformity with Section 1.52 of our rules may be returned as unacceptable"); and Cape Girardau, MO, 51 FCC 2d 492, 493 (Comm. 1975).

¹⁵ 5 FCC Rcd at 3919 n.41.

¹⁶ See 3 FCC Rcd at 5825.

¹⁷ The FM allotment priorities are: (1) first fulltime aural service; (2) second fulltime aural service; (3) first local service; and (4) other public interest matters. [Co-equal weight is given to priorities (2) and (3).] See Revision of FM Assignment Policies and Procedures, 90 FCC 2d 88 (Comm. 1982).

15. Second, in Lake City, SC, 47 FCC 2d 1067 (Comm. 1974), the Commission waived the procedural defect of not verifying a counterproposal in order to explore the possible public interest value of a second FM allotment to a community. We believe that Lake City is distinguishable because the unverified proposal lost on a comparative basis to a proposal for a first FM allotment at another community and the Commission apparently wanted to decide the case on the merits, as opposed to procedure. Thus, the Commission's decision did not prejudice the party that had complied with the procedural requirements.¹⁸

16. Finally, we agree with Twenty-One Sound that in the Brooksville and Quitman case, the staff noted that the Abuse of Process R&O placed all parties on notice that the verification requirements of Section 1.52 would be strictly enforced in allotment proceedings. Since the two rulemaking proposals in Brooksville and Quitman were filed before the effective date of the Abuse of Process R&O, they were considered even though they were not verified. The rationale for such an approach was apparently a lack of notice to such petitioners. However, consideration of these proposals did not prejudice any parties to the proceeding because both proposals were ultimately granted due to an amendment filed by one of the parties, which removed the conflict between the proposals. Under these circumstances, the resolution of these cases is consistent with the cases cited above where verification was overlooked because of a lack of prejudice. Unlike Brooksville, the present case does involve prejudice because consideration of Twenty-One Sound's counterproposal would prejudice KYLC's proposal, which was technically and legally correct when filed.

17. Likewise, in Decatur, Petal, and Newton, MS, 7 FCC Rcd 4998 (Allocations Br. 1992), the initial, jointly filed rulemaking petition was not verified but was nevertheless considered. The stated reason given for acceptance of that petition was the same as in the Brooksville and Quitman case – that is, “... because the petition ... was filed prior to the effective date [of the Abuse of Process R&O], we shall accept the petition.”¹⁹ However, consideration of this rulemaking petition did not prejudice other parties that had filed proposals compliant with our legal and technical rules.²⁰ As a result, the initial rulemaking petition, involving two, non-mutually exclusive allotments, was granted. Unlike Decatur, consideration of Twenty-One Sound's counterproposal would prejudice KYLC's proposal that was not defective.

¹⁸ We acknowledge that in Scottsboro, AL, 4 FCC Rcd 6473 (Allocations Br. 1989), the staff compared two mutually exclusive, FM allotment proposals on the merits and granted one without addressing any verification defect. Although the losing party sought to raise the verification issue on reconsideration, its petition was dismissed by the staff as procedurally defective because it relied on facts not presented previously and should have been raised during the comment and reply comment period. See 6 FCC Rcd 6111 (Policy and Rules div. 1991). The allotment was also retained because it would provide a first local service and because the rulemaking petitioner that had not originally verified its proposal was not among the applicants for the allotment and would not be involved further in this proceeding. This staff decision was not appealed to the Commission and appears to be at odds with the cases discussed above where the verification rule would not be waived if it would cause prejudice to a party that had complied with the procedural rules. To the extent Scottsboro, AL holds otherwise, it will not be followed.

¹⁹ 7 FCC Rcd at 4998 n.3.

²⁰ However, two counterproposals were dismissed for lack of verification because they were filed after the October 4, 1990, effective date for the Abuse of Process R&O and were, therefore, subject to strict enforcement of Section 1.52.

18. Accordingly, IT IS ORDERED That, pursuant to 47 C.F.R. Section 1.115(g), the Application for Review filed by Twenty-One Sound IS DENIED.

19. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary